the secretary's office, which are worth about £6 or £7. There are heritable debts on the property, amounting, with interest to Martinmas 1892, to £870, 10s. or thereby. The heritable creditors are The Arbroath West Port Association, Limited, having its registered office at Nos. 2 and 4 Keptie Street, Arbroath, for £550; Mrs Ann Anderson or Fraser, widow, residing at Killorn Cottage, Stirling, for £200, and the Royal Bank of Scotland for £103. The preferable debts due by the company, including expenses of liquidation, amount to about £180, and the ordinary debts amount to about £150.

"The capital of the company was, by memorandum of association, fixed at £2500, divided into 2500 shares of £1 each. 1250 shares have been issued, of which 1241 are fully paid up, and the arrears of calls amount only to £4.

"The liquidator proposes, with consent of the bondholders, to expose the hall property to public sale in January or February next, which is the best time for selling heritable property in Arbroath, and to sell the moveable fittings and effects of the hall, at a mutual valuation, to the purchaser of the hall property.

"In the meantime, until the property is sold, it will be essential for the beneficial winding-up of the concern that the business of the company should be carried on by the liquidator. The business consists simply of letting the halls for entertainments and for public and private meetings; and contracts have been entered into, some of which will not expire until Whitsunday 1893. The only liabilities which the liquidator will incur by doing so will be the taxes, caretaker's salary, feu-duty, interest, any repairs necessary in up-keeping the buildings, and such like, and the current revenue will in all probability be sufficient to meet these liabilities."

Reference was made by the petitioner to *More (Liquidator of the Burntisland Oil Company, Limited)* v. *Dawson and Others*, 30 S.L.R. 180.

The application was granted.

Counsel for the Petitioners — Lorimer. Agent—Alexander Ross, S.S.C.

---

*Tuesday, January* 31.

FIRST DIVISION.

[Sheriff-Substitute of Forfarshire.

## HORSLEYS *v.* BAXTER BROTHERS & COMPANY.

*Ship — Bill of Lading — Reparation — Exemption from Liability — Culpa — Onus of Proof.*

A cargo of jute carried under a bill of lading which stipulated that the ship was not to be liable, *inter alia*, for "sweat," arrived in a damaged condition. The shipowners having proved that the damage had been caused by "sweat," and the consignees having failed to prove fault on the part of the ship, it was *held* (following the case of *Moes, Moliere, & Tromp*, July 5, 1867, 5 Macph. 988) that the ship was not liable for the damage sustained by the cargo.

*Ship—Bill of Lading—Construction.*

A bill of lading, after exempting the shipowners from liability for "perils of of the sea, fire," &c., provided "that nothing *herein contained* shall exempt the shipowner from liability to pay for damage to cargo occasioned by bad stowage, by improper or insufficient dunnage or ventilation," &c. A subsequent clause provided that "the ship is not liable for 'sweat.'" *Held* that the qualifying words "herein contained" in the former clause applied only to the preceding exemptions, and did not qualify the subsequent clause, and that accordingly, where goods had been damaged by "sweat," the shipowners to escape liability were only bound to prove that fact, and were not bound to prove further that "sweat" was not caused by bad stowage or improper or insufficient dunnage or ventilation.

A cargo of 2504 bales of jute was shipped at Calcutta upon 20th September 1891 by the s.s. "Hesper" under bills of lading, "to be delivered, subject to the exceptions and conditions hereinafter mentioned, in the like good order and condition hereinafter mentioned, . . . at . . . Dundee. . . The following are the exceptions and conditions above referred to—"The act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates, and robbers, arrests and restraints of princes, rulers, and people, and other accidents of navigation excepted, strandings and collisions, and all losses and damages caused thereby are also excepted, even when occasioned by negligence, default, or error in judgment of the pilots, masters, mariners, or other servants of the shipowners; but nothing herein contained shall exempt the shipowners from liability to pay for damage to cargo occasioned by bad stowage, by improper or insufficient dunnage or ventilation, or by improper opening of valves, sluices, and ports, or by causes other than those above excepted, and all the above exceptions are conditional on the vessel being seaworthy when she sails on the voyage, but any latent defects in the machinery shall not be considered unseaworthiness provided the same do not result from want of due diligence of the owners, or any of them, or of the ship's husband or manager. The ship is not liable for insufficient packing or reasonable wear and tear of packages, for inaccuracies, obliterations, or absence of marks, numbers, address, or description of goods shipped, leakage, breakage, loss or damage by dust from coaling on the voyage, sweat, rust, decay. It is expressly declared that the owners of the steamer are not liable for

loss or damage occasioned by any latent defects in the hull, machinery, or equipment of this vessel, whether said defects existed before the commencement, or arose or developed during the currency of the voyage, provided all reasonable means have been taken to make the vessel seaworthy."

The vessel arrived at Dundee upon 7th November 1891. Baxter Brothers & Co., consignees of the cargo, paid the freight, less £95, 14s. 4d., the amount, as alleged, of loss sustained by them through a portion of the cargo being delivered in a damaged condition. To recover this sum Messrs George Horsley and Matthew Henry Horsley, owners of the "Hesper," brought an action against them in January 1892, in the Sheriff Court at Dundee.

The defenders averred that the "damage arose and was occasioned by the fault or negligence of the pursuers, or others for whom they are responsible, as follows—viz., by bad stowage, by want of vertical dunnage, or by improper or insufficient dunnage, and by want of or insufficient ventilation, or gross negligence in ventilating the cargo, and by other wrongous acts or neglects on the part of the pursuers, or of others for whom they are responsible. The pursuers thereby wrongously failed to implement and fulfil the obligations imposed upon them by the said bills of lading, to deliver the said jute in good order and condition. No part of the damage averred arose from sea water."

And pleaded—"The defenders having sustained the loss and damage condescended on by them, are entitled to set off the same against the balance of freight sued for, and they plead compensation accordingly."

The pursuers explained and averred "that during the voyage from Calcutta to Dundee the hatches were always kept open, and the ventilators were carefully attended to and kept open and properly regulated so as to ventilate the holds, except when they had to be kept closed in tempestuous weather for the safety of the vessel and cargo; as also, that on or about 24th October last very stormy weather and heavy seas were encountered, which caused the vessel to labour and roll about very much and ship great quantities of water on board, and which continued until the 29th; that on 1st November last very heavy and tempestuous weather and high and heavy seas were again encountered, which caused the vessel to labour and roll about and ship large quantities of water on deck; that in consequence of the said stormy weather and sea the hatches had to be battened down, and during the most of the time the ventilators had to be closed for the safety of the vessel and cargo; and that if any part of the said cargo or bales was damaged, the damage arose through no fault of the pursuers or others for whom they are responsible, but by 'sweat' which arose from the said bales in consequence of the jute having been shipped by the shippers before it was properly dried or winnowed, and which could not have been known to or observed by the pursuers or those for whom they are responsible, or otherwise by a latent defect or condition or inherent vice in the jute, or arose in consequence of the said tempestuous weather or sea, and of the hatches and ventilators having to be closed as aforesaid, or of one or other of the acts, perils, causes, or faults for which, by the terms of the contract between the parties, the pursuers are not responsible."

They pleaded—"In any view, if damage were sustained as alleged by defenders, it was not caused by the fault of the pursuers or anyone for whom they are responsible, and the defenders have no claim against pursuers in respect of it."

A proof was allowed, by which, in the unanimous opinion of the Judges of the First Division, the pursuers established that the damage done to the cargo was due to "sweat," viz. (in the definition of several witnesses) "condensed vapour or steam condensed as it reaches the cold deck, which then falls down from the ceiling on the top of the jute or on the sides of the ship. Jute is a green and perishable cargo, and there is always more or less moisture in it." The proof failed to show the reason of this sweat, but it was suggested that the jute had, owing to the lateness of the crop, been shipped with more moisture in it than usual, or that it was due to the cargo not all being of one quality, or to the ventilation of the cargo having been at times impossible owing to stress of weather. No fault was established by the defenders against the pursuers. The witnesses were divided in opinion as to the relative merits of horizontal and vertical dunnage, the former being adopted in this vessel, and also as to the use of wood in preference to iron, and of mats, which prevented water penetrating into the hold but also retarded evaporation.

Upon 13th June 1892 the Sheriff-Substitute (CAMPBELL SMITH) pronounced the following interlocutor — "Finds that in November 1891 the defenders obtained delivery from the pursuers' steamship 'Hesper' of 2504 bales of jute, specified in six bills of lading held by them, and that the freight of said bales of jute from Calcutta to Dundee was payable and partly paid by defenders, and that a balance of said freight, being the sum sued for, and amounting to £95, 14s. 4d., is still unpaid: Finds that the defenders refuse payment of said balance in respect of damage sustained by a portion of their jute during the voyage from Calcutta to Dundee: Finds that in point of fact damage to the amount of said balance was sustained by defenders' said jute, and that in point of law, *prima facie*, and on general principles, the pursuers, as common carriers who have failed to carry safely, are liable to make reparation for said damage unless they can establish some valid excuse: Finds that they have failed to establish any valid excuse arising either out of contract or out of common law, and that the excuses specially relied on by them, to the effect that the damage in question was caused (1) by the jute being damp and in bad order when shipped, and (2) by ventilation of the cargo during the latter part of the voyage

being rendered impossible through stormy weather, have not been proved either jointly or severally: Therefore repels the pursuers' answers to the claim for compensation, sustains said claim, and finds that the pursuers' claim for freight is extinguished by defenders' claim for damages: Therefore assoilzies the defenders from the conclusions of the prayer of the petition, and finds the pursuers liable in expenses, reserving a question as to modification," &c.

The pursuers appealed to the First Division, and argued—The Sheriff-Substitute had proceeded on the ground that they had failed to prove that the damage was not due to their fault. He had entirely overlooked the terms of the bill of lading. The first clause relieved the shipowners from liability for certain things even if due to their negligence, the second clause restored the common law liability of carriers for certain consequences, but by the third clause "sweat" was specially and absolutely excepted. Having proved, as they had done, that damage was due to sweat, it lay upon the defenders to prove negligence, which they had failed to do. The second clause qualified the first, but did not qualify the third clause, as the defenders argued, so as to make it necessary for the shipowners to prove it was sweat not due to their negligence. The case was ruled by that of *Moes, Moliere, & Tromp* v. *Leith and Amsterdam Shipping Company*, July 5, 1867, 5 Macph. 988. See also *P. & O. Company* v. *Shand*, 1865, 3 Moore's P. C. Rep. (New Series) p. 272; *Ohrloff* v. *Briscall* (the "Helene"), 1866, L.R., 1 Privy App. 231; *Czech* v. *General Steam Navigation Company*, 1867, L.R., 3 Com. Pleas 14; *Williams* v. *Dobbie*, June 27, 1884, 11 R. 982. Further, the shipowners proved that there had been no fault on their part. The cargo had been carefully stowed. The ventilation had been duly attended to. The vertical dunnage and the wood instead of iron desiderated were matters on which skilled witnesses differed. The ship chartered had iron and horizontal dunnage. If something different was required it should have been stipulated for. There was no fault in not providing a different kind of dunnage, even supposing that kind were better.

Argued for respondents—"Herein contained" in second clause of the bill of lading did not merely qualify what went before but applied to the whole document. Under a proper construction of that document, and reading the second and third clauses together, what was excepted was sweat if not caused by bad stowage or by improper or insufficient dunnage. This the pursuers had failed to prove. Where the excepted cause of damage—*e.g.*, sweat—was only, as here, the initial cause, and the proximate cause was something for which the shipowners were liable—here bad stowage, want of ventilation, and insufficient dunnage—the cargo owners were entitled to look at the proximate cause, and the exception did not relieve the shipowners unless they proved there had been no negligence. This they had not done, and further, the cargo owners had proved fault on the part of the shipowners. Jute was a difficult cargo to carry and yet proper precautions had not been taken, *e.g.*, vertical dunnage, by which moisture would escape, had not been supplied, and mats, which were now condemned as retarding evaporation, had been used, &c.—Bell's Prin. sec. 235, and cases there cited. *The "Nepoter,"* 1869, 2 Adm. and Eccles. 375; *The "Freedom,"* 1871, 3 Privy Co. App. 594; *Hamilton, Fraser & Company* v. *Pandorf & Company*, 1887, 12 App. Cases, 518 (converse case of proximate cause of damage).

At advising—

LORD PRESIDENT—I do not agree with the Sheriff-Substitute in the judgment which he has pronounced. The contract between the parties happens to bear very directly on the question now at issue between them; for the central fact in the case is that the particular condition of cargo which is made matter of complaint by the merchant is the subject of express provision in the bill of lading. This vital point seems to me to receive less attention from the Sheriff-Substitute than I am inclined to give it.

In this case, then, we start with the fact that the damage of which the merchant makes complaint was caused by sweat. Well, now, the bill of lading provides that the ship is not liable for . . . "sweat, rust, decay." The condition of the goods, of which complaint is made, is therefore one which is specified in the bill of lading as not giving rise to liability on the part of the ship. This being so, the merchant could, in the ordinary case, only prevail if he could prove that this condition of the goods had been caused by negligence on the part of those in charge of the ship. This is the law laid down in *Moes, Moliere, & Tromp* v. *Leith and Amsterdam Shipping Company*, 5 Macph. 988; for, according to that authority, the condition of the argument in such cases stands thus—the ship must first prove that the bad condition of the goods is one covered by an exception in the bill of lading; this being done, the *onus* shifts, and the merchant can only prevail if he proves that the bad condition was caused by the fault of the ship.

The respondent, however, contends that this rule is inapplicable to the present case, owing to another clause in the bill of lading by which it is provided that "nothing herein contained shall exempt the shipowners from liability to pay for damage to cargo occasioned by bad stowage, by improper or insufficient dunnage or ventilation." The respondent says that this clause must be read as qualifying the exclusion of liability where the defective condition of the goods is caused by sweat, and that the *onus* on the ship is only discharged when it has proved not merely that the cause of damage is sweat, but sweat caused otherwise than by bad stowage or improper or insufficient dunnage or ventilation.

I do not think that this contention is sound. It is important to observe the position which the words about bad stowage, and so on, occupy in the bill of lading.

They occur as a qualification or explanation of that exemption from the ship's liability which for shortness I shall call the perils of the sea clause. That this and nothing more is the true effect of these words, that they are relative solely to the perils of the sea clause, and that the word "herein" applies to and takes effect on that clause and does not relate to the clause which follows, is shown by the way in which the words in question are imbedded in the perils of the sea clause, and are immediately followed by the words "or by causes other than those above excepted," the latter again being followed by the words "and all the above exceptions" and so on. The words in question are really intended to negative the idea that under the cloak of perils of the sea the ship is to escape liability for bad stowage and improper or insufficient dunnage or ventilation. A sufficient illustration of the purpose of such words may be found in one of the cases referred to in argument—"*The Freedom*," L.R., 3 P. C. 594—where just the kind of contention was advanced on the perils of the sea clause which those words would expressly exclude. In short, the effect of the words founded on by the respondent is just the same as if the bill of lading had said, we do not mean the perils of the sea clause to cover bad stowage, or insufficient dunnage or ventilation, as to which we do not make any special stipulation.

If this view be sound, then the rule of *Moes, Moliere, & Tromp* has full application to the present case. Here, as there, you have words descriptive of a certain condition of goods—goods damaged with sweat; it is agreed that this phenomenon occurring in the goods shall not give rise to liability on the part of the ship, but this stipulation is held in law not to apply where the sweat can be proved to have arisen from the negligence of the ship.

The *onus* therefore, in my opinion, lies on the merchant to prove that the sweat which injured these goods on board the "Hesper," was produced by the negligence of the owners or those in charge of the ship. Now, the respondents' first complaint is that whereas there was on the "Hesper" horizontal permanent dunnage it ought to have been vertical, and whereas this dunnage was iron it ought to have been wood. I may say, in a word, that I find it impossible on the evidence before us to hold it proved that there was fault in either respect. This is a fine new ship of the highest class, and equipped apparently according to current ideas, and there is adequate evidence that at the commencement and in course of this voyage proper attention was given to stowage and ventilation. Of the witnesses who express an opinion on the different kinds of dunnage, permanent or moveable, some have one preference and some another; but on this evidence I could not justify a judgment that a shipowner is blameworthy for carrying jute from India without vertical dunnage or dunnage of wood. The other point made was that soft mats had been used on the top of and on the sides of the cargo, and that this was unnecessary and inexpedient, inasmuch as the mats intensified the conditions producing sweat and communicated it to the cargo. The evidence does not satisfy me that the use of these articles which is common for such purposes can be regarded as censurable. Nor am I at all convinced that the bad condition of the cargo in question was caused or contributed to either by the mats or by the want of appropriate dunnage. Although this cargo of the "Hesper" was worse than other cargoes of jute brought from India that season, yet many were bad in varying degrees, and an adequate cause for unusual damage is found in the bad weather encountered on the voyage. Moreover, it is difficult to avoid the conclusion that other than external causes contributed to the result. The same external conditions existed in several holds, the contents of only some of which were injured, while on the other hand the cargo was not of uniform quality but was made up of different brands.

My opinion is that the appeal should be sustained and decree given to the pursuers of the action.

LORD ADAM—This is an action brought by the shipowners for the sum of £95, 14s. 4d., being the balance of the freight earned by carrying a cargo of jute from Calcutta to Dundee. The defence against the payment is that the cargo when delivered was in a damaged condition, and that fact is not disputed. It is not disputed to some extent, as I understand, that the cargo was damaged, and the only question in this case is whether the shipowners are responsible for that damage. Now, I agree with your Lordship that the damage here was caused by sweat. In fact we may almost say that that is not disputed, at anyrate it is the cargo-owners' case that the damage was caused by sweat—sweat in that sense being vapour arising from the cargo and becoming condensed on the sides and under the deck of the ship and falling on the cargo and so causing the rot which is said to have taken place here.

Now, that being so, it takes us to the bill of lading, which constitutes the contract between the parties, to see what their mutual obligations were, and when we go to the contract we find a special clause to the effect that the ship is not liable in respect of "sweat, rust, decay," and the question arises whether this exception "sweat" is an absolute exception freeing the shipowners in all circumstances and in all events. I do not think that that is the proper construction of this clause, and I think the proper rule to be had in view, in disposing of the question, is that settled by the case of *Moes, Moliere, & Tromp*, to which your Lordship has referred. In that case we have an exception, just as in this case, saying that the ship should not be liable, and the Court held that the effect of that exception was to remove liability from the shipowners in respect of their obligations as carriers, but that it did not absolutely free the shipowners, it being still open to the owners of the cargo to

prove that such loss and damage, notwithstanding the exception, was caused by the fault and negligence of the shipowner. That, as I understand, is the application and the principle of *Moes, Moliere & Tromp*. This case is not quite the same, because we find on looking to this bill of lading that there is another clause which bears upon the matter, because after the ordinary clause which your Lordship has just referred to—the clause excepting the act of God and the perils of the sea—we find this—"That nothing herein contained shall exempt the shipowner from liability to pay for damage to cargo occasioned by bad stowage, by improper or insufficient dunnage or ventilation," or certain other things, "or by causes other than those above excepted." Now, I agree with your Lordship that in the construction of that clause it is properly an exception from what goes before, and if that be so, I concur with your Lordship's construction of this contract. But it was argued to us that that is not the proper reading or construction of this contract—that the exception which I have read was not an exception of all or any sweat, but only an exception of sweat not caused by the fault of the ship; and if that be the proper reading of it, the result would follow, that it would still lie on the shipowner to prove that there had not been fault or negligence or wrongdoing to the cargo, or improper or insufficient dunnage or ventilation. But that is not the form of the expression in this contract. We have the exception of sweat expressed in unlimited terms. The exception is from sweat, as I read it, of all kinds. That being so, I agree with your Lordship that the question, the real question, for us to consider in this case is, whether the cargo-owner has proved that the damage was caused by fault or negligence of the shipowner. That is the only issue of fact in the case.

Now, the faults alleged in the evidence were, first, those which were set forth in the bill of lading, viz., bad stowage, improper and insufficient dunnage and ventilation; and the question is whether or not the cargo-owners have proved the existence of such faults. First, as regards the bad stowage, I think not only that the cargo-owners have not proved that there was bad stowage or that the damage was caused by that, but that the evidence is the other way. Rogers, the stevedore, who unloaded the ship in Dundee, and all the men who were employed by him, say that the cargo was loaded just as such cargoes usually are, and the evidence of Whitton, a witness for the defenders, who was a cargo surveyor at Dundee, and certified and reported on the state and stowage of the cargo, says this—"In my opinion, the stowage of the cargo was tight, but I do not know that you can call it defective." If the stowage of the cargo was not such as to be called defective, that is not fault. I do not see how it would be possible for the cargo-owners to hold there was anything wrong with the stowage of the cargo. I think, therefore, as far as the stowage is concerned the cargo-owners have not proved their case.

The next thing they complained of was insufficient or improper dunnage. As I read the evidence, I do not think this is made out either. It appears from the evidence that the ship was loaded by men who were experienced stevedores, and if we are to believe the officers of the ship—the master and two mates—attention was paid by them at the time the cargo was being loaded to see that everything was right, and so far as I see, every ordinary and usual precaution was taken in the loading of the cargo. I see nothing in the evidence to favour the view of the Sheriff-Substitute, because there seems to have been every desire to assist the men in doing everything that was right in loading the cargo, so that it appears to me as to dunnage if there was an error at all in using the dunnage they did, it was more an error of judgment than anything else. The way in which the dunnage is said to have been objectionable is that it was horizontal and not vertical, and of iron and not of wood, and also that mats were used as part of the dunnage. It appears to me as far as being horizontal instead of being vertical, or iron instead of wood being used, that each of the systems has defects, and possibly each of them has advantages; but I agree with your Lordship that in that state of the evidence, where there are opinions on both sides as to which is best, it is quite impossible for us to say that because the shipowners adopted the one which they prefer, and which appears just to have as many admirers as the other, they are to be held in fault or negligence in the matter.

Then it was said, "Oh yes; but you might have had vertical dunnage in addition to the horizontal dunnage." That is quite true, and no doubt one of the witnesses says the more dunnage you have it is the better for the cargo. No doubt if they put dunnage a foot thick it would be all the better for the cargo, but the question is whether the shipowners were under any obligation to use such dunnage as that. They used, it appears to me, the dunnage usually employed in loading such cargoes, and having done that I do not think there can be any obligation on them to go further and have additional dunnage or additional securities for the protection of the cargo; and I think no fault lies on them in that matter.

In regard to the mats, they are very much in the same position. It appears from the evidence that just as many people say it is improper to load such cargoes without the use of mats, as there are who say that the use of mats is best both in respect of ventilation and decreasing liability to damp. It appears to me that the mats here used were for a protection from rust rather than from any idea of saving the ship from the effects of damp. I think that is the use to which they were put, and not improperly. I can quite understand that in some cargoes they may be of great advantage, although possibly here they have turned out to be the reverse of an advantage, if this were an exceptionally damp cargo.

Where there was less damp there would be possibly great advantage. How could we say there was fault on the shipowner when he was using mats to protect the cargo? Therefore I think on the third matter complained of the cargo-owners have failed to prove their case.

In regard to the matter of ventilation. Defective ventilation may be from more than one cause. It may be that the appliances of the ship in that matter were defective. I see no evidence of that. It may be that the cargo was so tightly loaded as to prevent the ventilation that would otherwise have taken place. I see no evidence of that either, for, as I have said, we were told that there was nothing defective, nothing wrong in the way the cargo was stowed. There is another matter in which the ventilation might be defective—in respect that it was not attended to by the officers of the ship on the way home. The only evidence of that is the evidence of the officers of the ship, but they tell us—and the log bears them out—that every attention appears to have been paid by them on the way to see that the ventilation was carried on—that they attended to the ventilators and to the removal of the hatches, and so on, and on that matter, which is the third matter in this case, I think the cargo-owners have also failed. That being so, I agree with your Lordship that the necessary result of this is that our verdict in the case should be for the shipowners.

As to the cause of the damage. If we are satisfied that there was no fault proved on the part of the shipowners, that is not material. But as far as I can judge from the evidence it appears to me to be proved, that for whatever reason, there was more damage than usual that year to those jute cargoes. There is the evidence of M'Call, and M'Rostie, and M'Donald, who were all defenders' witnesses, and engaged in the unloading of jute ships in Dundee, and they all say that, and are further corroborated by Rogers, the stevedore in Dundee, who says he has very large experience in unloading such ships. They all agree in stating that whatever may have been the cause, such was the case in regard to jute cargoes that year. We have also evidence that the jute harvest or the jute crop was unusually late, and that there was bad weather that year, and we know—we have it from the evidence of the cargo-owners' leading witness Scroggie—that jute is a perishable cargo, and has always more or less moisture in it. I think the evidence is that the cargo in this case had more than the usual amount of moisture, arising from the state of the crops, and possibly, to some degree, the state of the weather when being loaded. It was not so excessive as to produce rot in the heart of the bales to be visible to the officers of the ship when loading the bales on board. In my opinion, it was jute containing an unusual quantity of moisture, and the result was that there was an unusual quantity of vapour, and that, as I have said, combined with the stormy state of the weather for eight or ten days, led to this damage. On these grounds I think the interlocutor should be reversed.

Lord M'Laren—It is plain enough that the first question for consideration in this case is the true construction of the contract contained in this bill of lading between the shipowners, the owners of the "Hesper" on the one hand, and the consignees whomsoever they might be who should claim delivery under the bill of lading on the other, because, of course, by statute law the effect of the endorsation of the bill of lading is not only to pass the right of delivery of the goods, but also all collateral contracts which may be contained in the bill. Now, the bill begins in the usual way; after setting out the cargo, it begins with an obligation to the effect that this cargo is to be delivered subject to the exceptions and conditions herein mentioned in like good order and condition in which the goods were received, and these exceptions and conditions are just as much part of the contract as the obligation to deliver. The first exception is the one which your Lordships have referred to as a clause relating to perils of the sea, and I would observe upon this exception, that it begins by setting forth certain things—perils of the sea, fire, and so on—which are excepted "even when occasioned by negligence, default or error in judgment of the pilots, masters, mariners, or other servants of the shipowners," so that the primary object of this particular provision is to indemnify the shipowner from an action of damages for certain things even when these are the result of positive fault or error in judgment on the part of those in command of the vessel. But then in order that this exception may not be carried too far—may not extend to things where the master would not be excusable—that provision provides, "but nothing herein contained shall exempt the shipowner from liability to pay for damage to cargo occasioned by bad stowage, by improper or insufficient dunnage or ventilation, or by improper opening of valves, sluices and ports, or by causes other than those above excepted."

Now, if the words which I have already read beginning at "nothing herein provided shall exempt" are to constitute the whole and sole exceptions from the causes for which the owner may be indemnified against claims of damages, their effect would be to render all the subsequent clauses of the bill of lading perfectly futile if they include all clauses other than those above excepted. It is plain to my mind that this exception from the general clause about perils of the sea must itself be taken subject to the qualifications which result from the subsequent clauses, one of which deals specially with the case of damage resulting from sweat. In fact, if we apply the general rule of construction that words of qualification only qualify the immediately antecedent proposition, I think it must be taken that the "nothing herein contained" means nothing in this particular clause contained with

reference to the perils of the sea, or other things occasioned by the master. The effect of this exception is, that if the clause were sought to be applied to indemnifying the owners against damage resulting from insufficient dunnage, or insufficient ventilation, and so on, then it would still be necessary on the part of the master to prove that he had taken due care of the goods, and that he was not in fault. But then if that was to be a clause of universal application there could be no need for the elaborate enumeration of causes which follow. And one of these is that the ship is not liable for loss and damage caused by "sweat, rust, or decay." This is, I think, on sound construction, either a sub-exception from the one I have been commenting on, or is an independent provision exempting the owners from general liability in respect of the cargo being delivered in a condition damaged through sweat, rust, or decay. According to the decision in *Moes, Moliere, & Tromp*, these words have only the effect of shifting the *onus* of proof, because it would not be just nor consistent with any probable and reasonable construction of such contracts to hold that an absolute indemnity against liability was in view of the parties.

When we come to consider the question of fact in this case I come to the same opinion as the rest of your Lordships, that it has not been proved substantively, and in fact that the damage done to this cargo of jute through what is technically known as sweat is attributable to either the fault of the shipowner in regard to the equipment of the ship, or of the master or those responsible to him in her navigation. Judging from the somewhat extensive field of examination in the proof taken in the Sheriff Court, I should suppose that other causes than dunnage were in view when this action was originally defended. A strong attempt was made to show that due attention had not been paid to the ventilation of the vessel. That no doubt is a very important matter in the conduct of such cargoes, because it is matter of universal experience that all cargoes of vegetable matter are liable to undergo some sort of fermentation or chemical change during the voyage—what is generally known as heating—and that good ventilation is the best check against increasing injury of that description. Well, if we believe the evidence of the two mates, who are chiefly responsible for the care of the vessel, and the other evidence available—and there is nothing to suggest any doubt as to their credibility—everything was done that is usual and possible in regard to the ventilation of the vessel, and also the protection of the cargo from sea-water. It was necessary during some days of tempestuous weather to close the hatches, otherwise the cargo might have been damaged by sea-water, and to that extent practically ventilation of course was unavoidably neglected in order to protect the cargo against a greater risk.

Having failed in the endeavour to prove negligence on the part of the master, the argument is now raised entirely on the faulty construction and imperfect dunnage, and it seems to come to this, that in the view taken by the owners of such cargo the dunnage, which is primarily intended to protect the cargo against the incursion of sea-water, must be modified for each description of cargo so as also to protect it against injuries such as we are now considering. It is in my view unnecessary to consider whether there was any duty on the part of the owners of this vessel to modify its construction so as to adapt it specially for the conveyance of a cargo of jute, because I think the defenders have entirely failed to prove that any such modification would have the effect which they attributed to it. Their case seems to come to this, that if the strips of metal or wood which are attached to the ship's sides under the name of dunnage were placed in a vertical position, the condensation or sweat—the condensation of the vapour coming from the cargo—would trickle downwards, and would be less liable to come into contact with the cargo than where that condensation takes place on horizontal bars. I cannot say that the evidence has enabled me to form a very definite opinion on that point even supposing the ship were constantly in a state of rest, but I think if one looks at this with the eyes of common sense, and without any aid from expert knowledge, it must be plain that when a ship is making a sea voyage and exposed to the weather—her sides taking all possible angles under the action of the waves, and also being liable to receive incessant vibration from the seas that she encounters—that no arrangement of dunnage would prevent the water which collects upon the dunnage from reaching the cargo. This question of preference of vertical in place of horizontal dunnage appears to me to be altogether a fanciful affair, and one which could not possibly constitute a ground of liability under this bill of lading. If it be the desire of persons in the jute trade that some particular kind of dunnage, or some particular modification of the usual construction of ships should be applied to vessels that carry their cargoes, they have it in their power to stipulate in explicit terms that the vessel shall be fitted in a certain way; but it is not suggested that this bill of lading would bear any such construction. I am clearly of opinion that the defenders have wholly failed to prove that the damage to this cargo was caused by the fault either of the owner or the master of the "Hesper," or by causes other than those chemical changes which we know to a greater or less extent are very apt to take place when cargoes of produce are at sea.

LORD KINNEAR—I agree with your Lordships. I think the true meaning and effect of the bill of lading is that the shipowners are bound to take all reasonable care of the goods, but that they do not undertake to deliver them in the same condition in which they received them, if the damage be occasioned by any one of the variety of

causes including what is called "sweat." I am speaking now of the particular clause which we are called upon to construe, and the effect of that clause on the ordinary obligation of a shipowner. This is in accordance with the law laid down in the case of *Moes, Moliere, & Tromp* v. *The Leith Shipping Company*, as well as in the English cases which were cited to us. Now, the goods having been damaged, it lies upon the shipowner to show that the damage has arisen from one of the excepted causes, and upon the evidence I think with your Lordship that there can be no question that the direct cause of the damage was sweat in the sense of the bill of lading. The shipowners therefore will not be liable unless they have failed to perform their obligation to stow and carry the cargo with reasonable care and diligence.

In the present case the bill of lading sets forth in the first place the ordinary exemptions from perils of the sea, accidents to navigation and damage, and the like causes, and it stipulates that the ship is not to be liable for damage arising from these causes, "even although it be occasioned by negligence, default, or error in judgment of the pilots, masters, mariners, or other servants of the shipowners." Then there follows the qualification upon that stipulation, "that nothing herein contained shall exempt the shipowners from liability to pay for damage to cargo occasioned by bad stowage, by improper or insufficient dunnage or ventilation." And the argument of the shipowners was founded upon the construction of these words which the learned counsel imported into the clause with reference to sweat, rust, decay, as if they had occurred in that clause. Now, I concur with your Lordship's observation that these words are a qualification upon the stipulation contained in the first paragraph of the bill of lading, and that their effect is to exclude the plea of exemption from liability for perils of the sea although it be occasioned by negligence, if the damage can be ascribed to one or other of these exempted causes. If that part of the case can be imported according to the argument for the cargo-owners into the clause that we are construing, it does not appear to me it would displace *Moes, Moliere, & Tromp*, because the effect of that stipulation would still be that the shipowner did not undertake to deliver the goods in the condition in which he received them, but undertook to carry the goods with reasonable care and diligence unless it could be shown against him that there was negligence in some specified matter. Now, that would appear to me to raise very much the same question as if the liability for negligence had been left unlimited by the expression —the negligence for which the shipowner is to be liable being the fault to be proved against him in the same way as if he had made no stipulation on the subject and was liable for negligence of that kind.

But I agree with your Lordships that the clause we are now engaged in construing must be taken as a separate and distinct clause which is not in terms qualified by the words of the preceding part of the bill of lading. The stipulation is that the ship is not to be liable for "sweat, rust, decay," and other things. That will leave the ship still liable for fault or negligence even although the consequences of such fault or negligence may be damage of the kind which he has stipulated he is to be free from liability for. That is not, I think, disputed. The consignees however maintain that the shipowners are bound to disprove the existence of any one of these three specific faults as causes of damage. But the breach of obligation for which these shipowners are thus sought to be made liable, is not failure to deliver the goods in good order and condition according to the common law obligation of common carriers, but it is failure to stow and carry the goods with due care and diligence, and that appears to me really the whole case of the shipper. Now, if that be the question, then I think that the view taken in *Moes, Moliere & Tromp* is directly applicable, and that the true issue must necessarily be whether the goods have been damaged by the shipmaster's fault. In whatever precise form it may be put, that is the true question raised between the parties by the shippers. I do not think it at all necessary or expedient to consider whether or how far the *onus* of proof in such a case lies on one side or other, beyond this, that that being the true issue it is for the shipper to make out his case. Beyond that it does not appear to me there is any distinction of *onus* that can be laid down by law. There may be many cases in which the mere occurrence of the accident from its whole nature would be evidence tending to show negligence on the part of the shipowners; but the question must always be one of fact whether fault on the part of the shipowner has been proved or not. Now, on the evidence on that question I entirely agree with your Lordships. If the issue had been as I suggest, I think the shipowner would have been entitled to a verdict, and therefore I concur in the judgment which your Lordships propose.

The Court pronounced the following interlocutor:—

> Recal: Find in fact that the cargo in question was carried under contract in the bill of lading; that the damage complained of by the defenders and respondents was caused by sweat; that the defenders and respondents have failed to prove that the sweat was caused by negligence of the pursuers and reclaimers: Find in law that the pursuers and reclaimers are not liable for the said damages.

Counsel for Pursuers and Appellants—Jameson—Salvesen. Agents—Lindsay & Wallace, W.S.

Counsel for Defenders and Respondents—Lord Advocate Balfour, Q.C.—Dickson. Agent—J. Smith Clark, S.S.C.

---